

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2012-000427-001 DT

11/13/2012

THE HON. CRANE MCCLENNEN

CLERK OF THE COURT

J. Eaton

Deputy

STATE OF ARIZONA

WEBSTER CRAIG JONES

v.

MIKE A SCARPELLI (001)

NEAL W BASSETT

MESA MUNICIPAL COURT - COURT
ADMINISTRATOR

MESA MUNICIPAL COURT -
PRESIDING JUDGE

REMAND DESK-LCA-CCC

RECORD APPEAL RULING / REMAND

Lower Court Case No. 2010-069831.

Defendant-Appellant Mike A. Scarpelli (Defendant) was convicted in Mesa Municipal Court of violating A.R.S. § 28-1381(A)(3) (DUI—drug or its metabolite in person's body). Defendant contends A.R.S. § 28-1381(A)(3) is void due to the enactment of the Arizona Medical Marijuana Act ("AMMA"). For the reasons stated below, this Court affirms the judgment and sentence imposed.

I. FACTUAL BACKGROUND

On December 7, 2010, the State filed a long-form complaint against Defendant alleging that, on July 21, 2010, Defendant violated A.R.S. § 28-1381(A)(3) and 28-1381(A)(1) (DUI—impaired to the slightest degree). On May 11, 2011, Defendant filed two motions: a Motion To Suppress Evidence Due to Lack of Reasonable Suspicion for a Traffic Stop and Probable Cause for Arrest; and a Motion To Suppress Statements Made By Defendant After State Violated Defendant's Miranda Rights and Were Involuntary. On June 27, 2011, the trial court held an evidentiary hearing on the motions. Based on the evidence presented, the trial court denied the motions. The trial court held a jury trial on July 26 and August 2, 2011. At the beginning of the trial, and upon the State's motion, the A.R.S. § 28-1381(A)(1) charge was dismissed. Based on the evidence presented, the jury found Defendant guilty of violating A.R.S. § 28-1381(A)(3). On August 15, 2011, Defendant filed a timely notice of appeal. This Court has jurisdiction pursuant to ARIZONA CONSTITUTION Art. 6, § 16, and A.R.S. § 12-124(A).

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II. ISSUES:

A. Did Defendant Properly Raise His Issue Below.

Defendant contends A.R.S. § 28–1381(A)(3) is void due to the enactment of the AMMA. Nothing in the record transmitted to this Court shows Defendant raised this issue below. Nevertheless, an appellate court has discretionary authority to consider an argument for the first time on appeal when a defendant asserts that a statute is void. *State v. Ochoa*, 189 Ariz. 454, 459, 943 P.2d 814, 819 (Ct. App. 1997); *Fuenning v. Superior Ct. in and for the County of Maricopa*, 139 Ariz. 590, 594, 680 P.2d 121, 125 (1983); *State v. Junkin*, 123 Ariz. 288, 290, 599 P.2d 244, 246 (Ariz. App. 1979), *cert. denied*, 444 U.S. 983, 100 S.Ct. 489, 62 L.Ed.2d 411 (1979). An appellate court may appropriately exercise that discretion where, as in the case *sub justice*, the issue involves public policy or is of broad general or statewide concern. *Fuenning, supra*, at 594, 680 P.2d at 125. This Court concludes it is appropriate to consider the pertinent issues in this case.

B. Does the Arizona Medical Marijuana Act Apply in This Case.

Defendant contends A.R.S. § 36–2802(D)¹ trumps 28–1381(A)(3), thus permitting “people who have marijuana metabolites in their system (but who are not impaired) to drive.”² A.R.S. § 36–2802(D) is part of the AMMA, which consists of §§ 36–2801 to 36–2819. AMMA was added by 2010 Prop. 203 (an initiative measure), approved by the voters at the November 2, 2010, general election, and became effective on December 14, 2010. Notably, Defendant committed the charged offense on July 21, 2010, nearly 5 months before the AMMA was effective. A.R.S. § 1–244 provides that “No statute is retroactive unless expressly declared therein.” This Court finds no provision for retroactivity in the AMMA. Accordingly, AMMA does not apply to the case *sub justice*.

C. Does A.R.S. § 36–2802(D) Permit Drivers To Drive With Marijuana Metabolites in Their System Provided They Are Not Under the Influence of Marijuana.

After a careful review of the law, this Court finds nothing to support a conclusion that A.R.S. § 36–2802(D), or any subsection of the AMMA, trumps 28–1381(A)(3), thereby permitting a driver to operate a vehicle with marijuana metabolites in his system as long as he was not doing so while under the influence of marijuana. A.R.S. § 36–2802(D) simply states that a driver who is a registered, qualifying patient (for whom a physician recommended medicinal mari-

¹ A.R.S. § 36–2802(D) provides as follows:

This chapter does not authorize any person to engage in, and does not prevent the imposition of any civil, criminal or other penalties for engaging in, the following conduct:

D. Operating, navigating or being in actual physical control of any motor vehicle, aircraft or motorboat while under the influence of marijuana, except that a registered qualifying patient shall not be considered to be under the influence of marijuana solely because of the presence of metabolites or components of marijuana that appear in insufficient concentration to cause impairment.

² Appellant’s Memorandum, p. 6.

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juana), “shall not be considered to be under the influence of marijuana solely because of the presence of metabolites or components of marijuana that appear in insufficient concentration to cause impairment.” Clearly, this precludes an erroneous presumption about the presence of marijuana metabolites and a driver being “under the influence.” While A.R.S. § 36–2802(D) might be relevant in a prosecution for a violation of A.R.S. § 28–1381(A)(1), it has no application to 28–1381(A)(3). Consequently, A.R.S. § 28–1381(A)(3) is neither unconstitutional nor void.

III. CONCLUSION

Based on the foregoing, this Court concludes A.R.S. § 36–2802(D) is inapplicable in this case, and A.R.S. § 28–1381(A)(3) is neither unconstitutional nor void.

IT IS THEREFORE ORDERED affirming the judgment and sentence of the Mesa Municipal Court.

IT IS FURTHER ORDERED remanding this matter to the Mesa Municipal Court for all further appropriate proceedings.

IT IS FURTHER ORDERED signing this minute entry as a formal Order of the Court.

/s/ Crane McClennen
THE HON. CRANE MCCLENNEN
JUDGE OF THE SUPERIOR COURT

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